

## **EXHIBIT 6**

Name Michael S. Jones  
 Address Correational Training Facility  
P.O. Box 689 (GW-319)  
Soledad, CA 93960-0689  
 CDC or ID Number #E-40401

VENTURA  
SUPERIOR COURT  
**FILED**

FEB 02 2007

MICHAEL D. PLANET,  
Executive Officer and Clerk  
BY: \_\_\_\_\_, Deputy

THE SUPERIOR OF CALIFORNIA  
IN AND FOR THE COUNTY OF VENTURA  
(Court)

MICHAEL S. JONES  
Petitioner  
vs.  
ARNOLD SCHWARZENEGGER, GOVERNOR  
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. CR24985

(To be supplied by the Clerk of the Court)

INSTRUCTIONS — READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies.
- If you are filing this petition in the California Supreme Court, file the original and thirteen copies.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(h)(1) of the California Rules of Court [as amended effective January 1, 1999]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Page one of six

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Page one of six

This petition concerns:

<input type="checkbox"/> A conviction	<input checked="" type="checkbox"/> Parole
<input type="checkbox"/> A sentence	<input type="checkbox"/> Credits
<input type="checkbox"/> Jail or prison conditions	<input type="checkbox"/> Prison discipline

Other (specify): Governor's Reversal of Grant of Parole

1. Your name: Michael Scott Jones

2. Where are you incarcerated? Correctional Training Facility - Soledad California

3. Why are you in custody?  Criminal Conviction  Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

Second degree murder with use of a gun

b. Penal or other code sections: Penal Code § 187, § 12022.5(a)

c. Name and location of sentencing or committing court: Ventura County Superior Court - 800 S. Victoria Avenue - Ventura, California 93009

d. Case number: CR24985

e. Date convicted or committed: November 13, 1989

f. Date sentenced: December 11, 1989

g. Length of sentence: 15 years to life plus 2 years gun enhancement

h. When do you expect to be released? Unknown - overdue

i. Were you represented by counsel in the trial court?  Yes.  No. If yes, state the attorney's name and address:

Neil B. Quinn - Deputy Public Defender - Ventura County's Public Defender Office.

4. What was the LAST plea you entered? (check one)

Not guilty  Guilty  Nolo Contendere  Other:

5. If you pleaded not guilty, what kind of trial did you have?

Jury  Judge without a jury  Submitted on transcript  Awaiting trial

6. GROUNDS FOR RELIEF

**Ground 1:** State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

Please See Attached Page 7

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

Please See Attached Page 7

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

7. Ground 2 or Ground \_\_\_\_\_ (*if applicable*).

\_\_\_\_\_

a. Supporting facts:

b. Supporting cases, rules, or other authority:

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8. Did you appeal from the conviction, sentence, or commitment?  Yes.  No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

California Court Of Appeal - Second Appellate District

b. Result: Judgment Affirmed

c. Date of decision: March 21, 1991

d. Case number or citation of opinion, if known: BO47476

As All The Court's Instructions On Mental States Referred To Malice Or The Intent To Kill, The Court Erred In

e. Issues raised: (1) Giving An Elements Instruction On 2nd Degree Murder (CALJIC 8.31) That Did Not Mention Malice  
The Court Erred In Refusing Appellant's Requested Jury Instructions That Informed That Explicitly Informed The  
(2) Jury Of The Types of Voluntary Manslaughter That Exists Where Malice Is Lacking... Voluntary Intoxication

The Court Erred In Refusing To Give Appellant's Proposed Instruction On Types Of Emotions That Can Constitute  
(3) Heat of Passion (4) The Court Erred In Failing To Include The Murder Elements Instruction The Requirement

That Jury Find Absence Of Heat of Passion, Sudden Quarrel And Voluntary Intoxication Sufficient To Negate Malice

f. Were you represented by counsel on appeal?  Yes.  No. If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court?  Yes.  No. If yes, give the following information:

a. Result: Petition Denied

b. Date of decision: June 10, 1991

c. Case number or citation of opinion, if known: BO47476

d. Issues raised: (1) Same As Appellate Court - See Above

(2)

(3)

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

Not Applicable

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

None available against the Governor in this type of matter.

b. Did you seek the highest level of administrative review available?  Yes.  No.  
Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court?  Yes. If yes, continue with number 13.  No. If no, skip to number 15.

13. a. (1) Name of court: Ventura County Superior Court

(2) Nature of proceeding (for example, "habeas corpus petition"): Petition For Writ of Habeas Corpus.

(3) Issues raised: (a) Illegal denial of Parole Suitability by Board of California Prison Terms.  
(Subsequent Hearing #1)

(b) \_\_\_\_\_

(4) Result (Attach order or explain why unavailable): Petition Denied.

(5) Date of decision: September 23, 2003

b. (1) Name of court: California Court of Appeal - Second Appellate District Division 6

(2) Nature of proceeding: Petition for Writ of Habeas Corpus.

(3) Issues raised: (a) Illegal denial of Parole Suitability by California Board of Prison Terms.  
(Subsequent Hearing #1)

(b) \_\_\_\_\_

(4) Result (Attach order or explain why unavailable): Denied

(5) Date of decision: December 2, 2003

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

There has been no delay.

16. Are you presently represented by counsel?  Yes.  No. If yes, state the attorney's name and address, if known:  
Stephen Defilippis - 625 N. First Street - San Jose, CA 95112. Please Note: Mr. Defilippis  
only represents petitioner on his First Federal Petition Case No. C 04-02105 JSW.

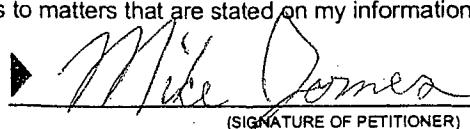
17. Do you have any petition, appeal, or other matter pending in any court?  Yes.  No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

This Court has original jurisdiction in habeas proceedings.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 1/30/07

  
 (SIGNATURE OF PETITIONER)

Continuation of Question 13a, Page 6 of Petition.

California Supreme Court - Petition For Review (Subsequent Hearing #1)  
Illegal denial of Parole Suitability by California Board of Prison Terms.  
Denied on February 18, 2004.

United States District Court - Northern District of California  
(Subsequent Hearing #1) Case No. C 04-02105.  
Petition for Writ of Habeas Corpus  
Illegal denial of Parole Suitability by California Board of Prison Terms.  
Denied on April 10, 2006  
Motion For Reconsideration Filed - Pending.

Ventura County Superior Court - (Subsequent Hearing #2)  
Petition For Writ of Habeas Corpus  
Illegal denial of Parole Suitability by California Board of Prison Terms.  
Denied on October 15, 2004.

California Court of Appeal - Second Appellate District (Subsequent Hearing #2)  
Petition For Writ of Habeas Corpus  
Illegal denial of Parole Suitability by California Board of Prison Terms.  
Denied on January 13, 2005.

California Supreme Court (Subsequent Hearing #2)  
Petition For Review  
Illegal denial of Parole Suitability by California Board of Prison Terms.  
Petition For Review Denied on March 30 2005.

United States District Court - Northern District of California  
Case No. C 05-2573 JSW(PR) (Subsequent Hearing #2)  
Petition For Writ of Habeas Corpus  
Illegal Denial of Parole Suitability by California Board of Prison Terms.  
Respondent's Filed Motion to Stay Proceedings - March 3, 2006.  
Petitioner Filed Opposition To Motion To Stay Proceedings on April 7, 2006.  
Court Granted Order to Stay Proceedings on March 17, 2006 - Pending...

1 THE GOVERNOR VIOLATED PETITIONER'S DUE PROCESS AND  
2 DEPRIVED HIM OF HIS FEDERALLY PROTECTED LIBERTY  
3 INTEREST WHEN HE REVERSED PETITIONER'S PAROLE GRANT  
4 WITHOUT ANY RELIABLE EVIDENCE DEMONSTRATING  
5 PETITIONER CURRENTLY ENDANGERS PUBLIC SAFETY IN  
VIOLATION OF THE 5TH AND 14TH AMENDMENT TO THE UNITED  
STATES CONSTITUTION.

5 Supporting facts:

6 1. On May 1, 2006, Petitioner appeared before the Board of Parole hearings  
7 (BPH) for the fourth time, was found suitable for parole, and his term  
8 computed. (See Exhibit A, Transcript of Petitioner's May 1, 2006, Parole  
9 Hearing, incorporated by reference.) The Governor reversed that decision,  
10 and denied parole to Petitioner. (See Exhibit B, copy of letter dated  
11 September 28, 2006, from the Governor's Legal Affairs Secretary, with  
12 Governor Schwarzenegger's Reversal Opinion attached incorporated by  
13 reference.) In essence, the Governor failed to properly recognize  
14 Petitioner's pre-offense crime free life, his disciplinary free and  
15 otherwise excellent prison program, and that Petitioner accepts  
16 responsibility for his actions and is truly sorry for he did. However,  
17 the Governor noted his belief that Petitioner "Committed an extremely brutal  
18 and callous second-degree murder demonstrating an exceptionally callous  
19 disregard for human suffering, because he fled the scene." Petitioner will  
20 demonstrate in the below paragraphs the Governor's declaration is not  
21 supported by the evidence.

22 2. Petitioner previously appeared before the Board in 1999, 2002, and  
23 2004 See Exhibit C, chronologically arranged copies of these previous  
24 decisions; incorporated by reference, for information purposes only. This  
25 writ appeals only the Governor's reversal of the 2006 grant of parole.

26 3. On May 19, 1989, Petitioner shot and killed his roommate Thomas Day.  
27 The type of wounds suffered by the victim clearly demonstrate death was  
28 almost instantaneous. The facts and causes of this unfortunate killing

1 are well documented. See Exhibit A, pp.7-10, Exhibit D, Psychiatric  
2 Evaluation dated January 14, 2006, prepared by M. Macomber, Ph.D. Staff  
3 Psychologist, incorporated by reference.

4 As the records show, Petitioner's mother and father divorced when  
5 he was approximately five years of age. He and his brother remained with  
6 his mother and her new husband until he was approximately ten, at which  
7 time he went to live with his father in Hawaii. After moving to Hawaii  
8 with his father, he and his brother stayed for approximately one year.  
9 He then returned to live with his mother and her new husband, but he never really  
10 got along with the new husband, and moved back to live with father. This  
11 same changing of residence occurred a couple more times, and then at age  
12 16 he became legally emancipated. He was living on his own, working and  
13 attending high school, but due to the pressures of taking care of himself  
14 he dropped out of high school. Petitioner had known the victim for  
15 approximately 7 years and had lived with him for three years prior to  
16 commitment offense. Petitioner's girlfriend had recently broken up with  
17 him, as a result he was distraught and began drinking excessively. He was  
18 told to take time off of work due to being agitated at work because of  
19 the issues with the failed relationship. He began drinking at noon on the  
20 day of the instant offense, he left work early, and went to a tool  
21 convention where he began drinking. Upon leaving the convention he stopped  
22 at a liquor store to purchase more alcohol and returned home, where he  
23 continued drinking, until friends came by to ask if wanted to go to the  
24 bar with them. The group left the bar went to the home of Bernie who lived  
25 across the street from Petitioner. A friend drove Petitioner to his  
26 neighbor's house. Petitioner showed a revolver to the friend stating he  
27 needed it for protection and asked that the gun not be mentioned to anyone.  
28 The neighbor's brother complained about noise Petitioner and his friends

1 were making about three a.m. They then moved to Petitioner's house across  
2 the street, card playing and beer drinking until the victim Thomas Day  
3 came out of his room to complain about the noise. Petitioner told the victim  
4 he paid rent and was entitled to invite people to his house. The pair  
5 briefly scuffled. The neighbor suggested the group move back to his house,  
6 but recommended Petitioner call it an evening and stay home. Petitioner  
7 complied and the others left. Another argument ensued between Petitioner  
8 and the victim. Morrissey, the third roommate, heard the victim tell  
9 Petitioner, "30 days and you're out of here". Morrissey and several  
10 neighbor's then heard the sounds of gunshots. Then the victim knocked on  
11 Morrissey's bedroom door and asked him to call an ambulance. By the time  
12 the ambulance arrived Day had stopped breathing and could not be revived.  
13 Petitioner left the house and took a bicycle from a neighbor's garage and  
14 rode away. A police officer saw Petitioner riding the bicycle Petitioner  
15 jumped off the bike and began running when the officer approached. Another  
16 officer tackled him and a gun skidded away from his body. He was arrested.

17 4. Petitioner was convicted by jury trial of second degree murder, and  
18 was sentenced to 15 years to life, plus a two year enhancement for the  
19 weapon. This court found from its inception this case was not a premeditated  
20 murder, and further recognized that Petitioner had a need to be housed  
21 at a facility in the Department of Corrections that was best equipped to  
22 deal with what this court perceived was a substantial psychiatric and/or  
23 psychological problem, along with substance abuse. (See Exhibit E, at pp.  
24 2 and 8-9, Copy of the Sentencing Transcripts, incorporated by reference)  
25 As the records show, Petitioner has sought out and participated in self-help  
26 groups/programs since his arrival in the Department of Corrections, and  
27 continues to participate in AA/NA along with Anger Management classes.  
28 (see Exhibit A, at p. 60-61 and 66-67. Also see Exhibit F, Copies of

1 AA/NA Laudatory Chronos, Anger Management, etc..)

2 5. Petitioner's prior criminal history consist of an arrest for DUI, and

3 Drunk in Public for which he was held until he sobered up and then released.

4 6. Petitioner has received no serious disciplinaries while in prison - no

5 CDC 115's and only two 128's (Exhibit A, p.62), has realistic parole plans

6 (Id. at 61), is remorseful (Id. at 62) and while in prison has upgraded

7 vocationally and educationally (Id. at 60. Also see Exhibit G, Copies of

8 GED, Vocation Completion, and College grades).

9 7. Petitioner has received numerous letters from family and friends

10 supporting his being released on parole, contianing job offers and offers

11 of residence, etc. (See Exhibit A, p.61. Also see Exhibit H, copies of these

12 letters, incorporated by reference.)

13 8. The CDC psychological evaluations of Petitioner prepared for the Board

14 unequivocally supports his being released onto parole (See Exhibit D, the

15 January 14, 2006, Psychological Evaluation of Petitioner for the Board,

16 as well as the previous evaluation on which it partially relies, incorporated

17 by reference.) The Psychologist found that Petitioner's "prognosis for

18 community adjustment is excellent" (Exhibit D, pp.3-4), he expressed deep

19 remorse for committing the crime, (Id. p.2), takes responsibility for his

20 actions (Id. at p.1), "his violence potential is estimated to be no higher

21 than that of the average citizen in the community." (Id. at p.3).

22 9. The CDC Custody Counselor's Life Evaluation Report (LPER) prepared for

23 the Board, supports Petitioner being released on parole. (See Exhibit I,

24 copies of CDC Custody Counselor's prepared Life Evaluation Reports (LPER's)

25 documenting Petitioner's prison performance record, incorporated by

26 reference.)

27 10. The Governor's (Exhibit B, p.2) finding that the offense was carried

28 out in a manner which demonstrated an exceptionally callous disregard for

1 human suffering is clearly contrary to the facts in the record and to  
2 governing law. A Cal. Code Regs., title 15, §240(c)(1)(D) finding of  
3 exceptionally callous disregard for human suffering requires the intent  
4 and act of inflicting prolonged torturous pain, simply not present in this  
5 case. (See e.g. In re Rosenkrnatz (2002) 80 Cal.App.4th 409, 419-420; In  
6 re Ernest Smith (2003) 114 Cal.App.4th 343, 366.)

7 11. The sole basis for which the Governor has reversed Petitioner's parole  
8 grant are the circumstance of the crime he committed. However, the validity  
9 of the predictive value of the unchanging circumstances of an offense  
10 committed over 17 years ago as an indicator of future dangerousness is  
11 nil at best, precluding crime factors used in this case to support a finding  
12 of current dangerousness. (See In re Lee (2006) Cal.Rptr.3d 931, 936,)  
13 holding the factors of a crime in that case involving multiple shooting  
14 victims, including one murder, lacks predictive value after 10 years, when  
15 accompanied by positive prison performance and lack of a [significant]  
16 criminal record.) Petitioner also appeals the specific factors used by  
17 the Governor to support his reversal of his parole grant, alleging no  
18 evidence or legal basis supports his application to his case factors,  
19 rendering their use arbitrary..

20 12. Petitioner's life term started on 9/2/1990. (See Exhibit A, p.1.) To  
21 date, he has served 15½ years on that term, for which he received 62 months  
22 of Cal. Code Regs., title 15, §2410 post-conviction credit resulting in  
23 his having served an equivalent of 20½ years of imprisonment. The uniform  
24 term for Petitioner's crime facts is a §2403(c), Matrix II-B, 17-18-19  
25 year term. Category B applies, due to death being almost immediate. Assuming  
26 the aggravated term for multiple shots/wounds, Petitioner has served almost  
27 three more than required for the gravity of the crime.

PRAYER

WHEREFORE, Petitioner prays this Court:

1. Find no relevant evidence in the record supports the Governor's decision to reverse parole,
2. Find no evidence demonstrates any factor enumerated in Cal. Code Regs., tit, §2402(c)(1)(A) through (E) supports the Governor's finding Petitioner's offense is heinous or (even more atrocious, therefore,
3. Order Petitioner released forthwith.
4. Expedite this matter, by granting calendar preference, as Petitioner is overdue for release.

## 1                   MEMORANDUM OF POINTS AND AUTHORITY

## 2                   INTRODUCTION

3

4         California Constitution, Article V, §8(b) and its implementing  
5 statute, Penal Code §304.2, provides the Governor the authority to review  
6 a parole decision, and as part of that review, to affirm, modify or reverse  
7 that decision. The Governor must provide a statement of his reasoning  
8 for the decision to reverse a grant of parole, must make and issue that  
9 decision within 30 days after the Board's decision becomes final. He must  
10 review the record before the Board and cannot consider additional evidence.  
11 further, his decision must be based on the same factors the Board is  
12 required to consider (In re Rosenkantz (2002) 29 Cal.4th 616.) The  
13 decision must be based on some reliable evidence, relevant evidence. (Id.  
14 at 676-677.) To constitute "some evidence," the information relied upon  
15 by the Governor must tend to logically, and by reasonable inference, to  
16 establish a fact relevant to the inmate's suitability for parole. (In  
17 re Morrall (2002) 125 Cal.Rptr.2d 397, 407.) The evidence must show the  
18 prisoner would currently be a threat to society if released. A standard  
19 as the Governor fails to meet in this case, rendering his decision to  
20 reverse an abuse of discretion and arbitrary.

## 21                   LEGAL ARGUMENT

22                   I. PETITIONER HAS A FEDERALLY PROTECTED  
23                   LIBERTY INTEREST IN PAROLE RELEASE.

24         It is well established that all indeterminately sentenced prisoners  
25 possess a federally protected liberty interest. See McQuillion v. Duncan  
26 (9th Cir. 2002) 306 F.3d 895, 901-902; Biggs v. Terhune (9th Cir. 2003)  
27 334 F.3d 910, 914-915, relying on Greenholtz . Inmates of Nebraska (1979)  
28 441 U.S. 1); Board of Pardons v. Allen (1987) 482 U.S. 369, 377-378,

1 clearly reasoning that the similar structure and phrasing of California's  
 2 parole statutes (Penal Code §3041, subd. (b)) when compared to those of  
 3 Nebraska and Montana produces the same result in this state - a federally  
 4 protected liberty interest. A liberty interest the Biggs court held on  
 5 pp. 94-95, arises "upon the incarceration of the inmate." The recent  
 6 decision in In re Dannenberg (2005) 34 Cal.4th 1061 is limited to the  
 7 uniform term provision of Penal Code section 3041, subd.(a), and has no  
 8 bearing on the Ninth Circuit holding that the mandatory language of  
 9 sub-section (b) creates a liberty interest in parole.

10       II. DENIAL OF PAROLE FOR FOURTH TIME BASED ON  
 11 THE IMMUTABLE CIRCUMSTANCES OF THE COMMITMENT  
 12 OFFENSE, AFTER 17 YEARS, WHILE IGNORING  
 13 REHABILITATION DEMONSTARATED BY LONG TERM  
 14 EXEMPLARY PRISON PROGRAMMING, DEPRIVES A  
 15 PRISONER OF DUE PROCESS.

16       State and federal courts have repeatedly held that even if the offense  
 17 circumstances are considered under regulatory law to support parole  
 18 denial, due process may preclude the crime alone justifying repeated  
 19 parole denials, in the face of a prison record demonstrating  
 20 rehabilitation. (See e.g. In re Smith (2003) 114 Cal.App.4th 343, 372;  
 21 Biggs v. Terhune (9th Cir. 2003) 334 F.3d 910-916-917; In re Scott (2005)  
 22 35 Cal.Rptr. 905, 919-920; Irons v. Warden (E.D. Cal. 2005) 358 F.Supp.3d  
 23 936, 947947). Disregarding that standard, the state parole executive  
 24 has denied Petitioner parole four times, each time based on the unchanging  
 25 factors of his offense. Findings that ignore or improperly discount  
 26 Petitioner having led a crime free life and having a prison record without  
 27 a disciplinary during his 15½ years of imprisonment, his having positively  
 programmed, and his repeatedly demonstrated remorse for the resulting  
 loss of life.

28       As the record shows, Petitioner has demonstrated his rehabilitation

1 by participating in self-help programming, educational improvement and  
 2 successfully working in various jobs. The CDC mental health staff evaluated  
 3 Petitioner for the Board and supports his release on parole, finding he  
 4 would pose a reasonable degree of threat to the public if released on  
 5 parole. (See Exhibit D.) The CDC Custody Counselor made a similar finding.

6 Clearly referring to a prisoner having been denied parole numerous  
 7 times based on unchangeable factors; with a prison record such as  
 8 Petitioner's, the court in Biggs v. Tehune, supra, 334 F.3d, held:

9 "[While] the parole board's sole supportable reliance  
 10 on the gravity of the offense and conduct prior to  
 11 imprisonment to justify denial of parole [may] be  
 12 initially justified as fulfilling the requirements set  
 13 forth by state law, [o]ver time, however, should [a  
 14 prisoner] continue to demonstrate exemplary behavior  
 15 and evidence of rehabilitation, denying him parole simply  
 16 because of the nature of his offense would raise serious  
 17 questions involving his liberty interest in parole."  
(Id. at 916.)

18 In People v. Seel (2004) Cal.4th 535, 546, the State Supreme Court  
 19 held, "The degree of criminal culpability the legislature chooses to  
 20 associate with particular, factual distinct conduct has significant  
 21 implications both for a defendant's very liberty and the heightened stigma  
 22 associated with offense the legislature has selected worthy of greater  
 23 punishment. (Apprendi v. New Jersey (2000) 503 U.S. 466, 495." The jury  
 24 in this case found petitioner's culpability to be that of second-degree  
 25 murder. The Governor's heightening of Petitioner's culpability by defining  
 26 his offense conduct and elements as those of a first-degree murder i.e.  
 27 one demonstrating premeditated conduct, and requiring he serve a prison  
 28 term allocated solely for that crime, runs counter to this legislative  
 policy noted by the Supreme Court. While the uniform term for Petitioner's  
 offense is in fact a Cal. Code Regs., title 15, § 2403(c), Matrix II-B,  
 17-18-19 (credit) year term, with his [now] 5+ years of post-conviction

1 credits applied, Petitioner has now served a 20 year prison term, therefore  
 2 one exceeding that required for his offense. To allow parole denial solely  
 3 on the facts of the crime after a prisoner has served the term specified  
 4 by statute and regulation for the gravity (factual) circumstances of that  
 5 crime can only be described as a unconstitutionally vague standard. See  
 6 In re Dannenberg, supra, fn. 7, at p. 1079, holding when a prisoner's term  
 7 of imprisonment is set, it cannot be of a length lesser or greater than  
 8 that specified by [statute and] regulation. On the other hand, Dannenberg  
 9 permits parole denial based on facts of the offense which are more than  
 10 the minimum necessary to support a conviction. A standard which is undefined  
 11 and can arbitrarily be applied to every murder offense. Petitioner thus  
 12 has no idea of what is expected or prohibited in this matter, enabling  
 13 his being retained in prison,. The fn. 7 Dannenberg standard or the minimum  
 14 necessary standard? Such a conflict renders the state standard  
 15 constitutionally vague.

16 In this case, the Governor [again] relied on the alleged predictive  
 17 value of Petitioner's offense as a basis for reversing his grant of parole  
 18 from his parole hearing. Assessing a similar chronological situation, for  
 19 a far more serious first-degree murder and associated crimes than that  
 20 committed by Petitioner, a federal district court judge reasoned that:

21 Whether the facts of the crime of conviction, or other  
 22 unchanged criteria, affect the parole eligibility decision  
 23 can only be predicted on the "predictive value" of the  
 24 unchanged circumstance. Otherwise, if the unchanged  
 25 circumstances per se can be used to deny parole  
 26 eligibility, sentencing is taken out of the hands of  
 27 the judge and totally reposed in the hands of the BPT.  
 28 That is, parole can be denied indefinitely and forever  
 delayed based on the nature of the crime even though  
 the sentence given set forth the possibility of parole  
 - a sentence given with the facts of the crime fresh  
 in the mind of the judge. While it would not be a  
 constitutional violation to forgo parole altogether for  
 certain crimes, what the state cannot do is have a sham  
 system where the judge promises the possibility of parole,

1 but because of the nature of the crime, the BPT  
 2 effectively deletes such from the system. Nor can  
 3 a parole system, where parole is mandated to be  
 4 determined on someone's future potential to harm the  
 5 community, constitutionally exist where despite 20  
 6 or more years of prison life which indicates the  
 7 absence of danger to the community in the future,  
 8 the BPT commissioners' revulsion toward the crime  
 9 itself, or some other unchanged circumstances must  
 10 indicate a present danger to the community if released,  
 11 and this can only be assessed not in a vacuum, after  
 12 four or five eligibility hearings, but counterpoised  
 13 against a backdrop of prison events. (Relying on Bair  
 14 v. Folsom State Prison, 2005 WL2219220\*12, n.3  
 15 (E.Cal.2005) report recommendation adopted by 2005  
 16 WL3081634 (E.D.CA.2005).  
 17

18 Given the factual circumstances of this case, the Board's repeated  
 19 sole reliance on the unchanging circumstances of Petitioner's crime as  
 20 found by the Governor, and his characterizing it as one of a higher  
 21 culpability than factually found by the jury violates Petitioner's due  
 22 process. (See Martin v. Marshall (N.D. 2006) F.Supp.2d\_,WL 1344584, \*8,\*9.)  
 23 The continued reliance by the Board, and now the Governor, on unchanging  
 24 factors makes a sham of the state's parole system. It amounts to an  
 25 arbitrary denial of Petitioner's liberty interest by converting his sentence  
 26 from one of 15 years to life, to that of a more serious first-degree murder  
 27 crime carrying a sentence of either 25 years to life or life without the  
 28 possibility of parole. Another court in a case with a far more serious  
 second degree murder crime than that committed by Petitioner has  
 characterized this situation as follows:

29 "[C]ontinuous reliance on unchanging circumstances  
 30 transforms an offense for which California law provides  
 31 parole eligibility into a d facto life imprisonment  
 32 with the possibility of parole. The court ask this  
 33 rhetorically - what it is about the circumstances of  
 34 Petitioner's crime or motivation which are going to  
 35 change? The answer is nothing. The circumstances of  
 36 the crime will always be what they were and Petitioner's  
 37 motive for committing the [crime] will always be [what  
 38 it was]. Petitioner has no hope for ever obtaining parole  
 except that perhaps that a panel in the future will

1           arbitrarily hold that the circumstance s were not  
 2           that serious...Given that no one seriously contends  
 3           lack of seriousness...at present time, the potential  
 4           for parole in this case is remote to the point of  
 5           non-existence. Petitioner's liberty interest should  
 6           not be determined by such an arbitrary, remote  
 7           possibility." (Irons v. Warden (E.D.Cal.2005) 358  
 8           F.Supp.2d 936, 947.

9  
 10          By defining Petitioner's culpability as higher than found by the jury,  
 11          and by continuing to rely on those factors after 15+ years of imprisonment  
 12          as an indicator of present dangerousness, given Petitioner's very positive  
 13          prison performance, positive, parole supportive CDC psychological  
 14          evaluations and custody counselor reports (LPER's), the Governor in this  
 15          case has violated due process. The ability of the state parole executive  
 16          to predict Petitioner's future dangerousness based on the circumstances  
 17          is nil. Irons, Id., fn.2 at 947. Also see IN re Scott, supra, 133  
 18          Cal.App.4th at 595, 34 Cal.3d 905, holding:

19          "The commitment offense can negate suitability only  
 20          if the circumstances of the crime reliably established  
 21          by evidence in the record rationally indicate that the  
 22          offender will present an unreasonable public safety  
 23          risk if released from prison. Yet, the predictive value  
 24          of the commit offense may be very questionable after  
 25          a long period of time." (Id., at 920) "Therefore, an  
 26          unsuitability determinations must be predicted on 'some  
 27          evidence' that the particular circumstances of [the  
 28          prisoner's] crime - circumstances beyond the minimum  
 29          elements of this conviction - indicate exceptional  
 30          callousness and cruelty with trivial provocation, and  
 31          thus suggest he remain a danger to public safety.' (In  
 32          re Dannenberg, supra, 34 Cal.4th at 1098.) (Scott, Id.,  
 33          at 922)"

34          Nothing in Petitioner's post-conviction record provides any evidence  
 35          of re-offending, and his culpability and associated facts cannot be declared  
 36          to be higher than found the trial court. See Blakely v. Washington, (2004)  
 37          542 U.S. 296, 124 S.Ct. 2531, 154 L.Ed. 403, holding that while a parole  
 38          board may rule on the facts essential to their discretion, these facts  
 39          cannot preclude the defendant's legal right to a lesser sentence, and

1 therefore the right to a lesser penalty. Therefore, "the facts bearing  
 2 on that commitment [offense] must be found by a [trial court]." Id., 124  
 3 S.Ct. at 2540, 154 L.Ed.2d at 417.) Otherwise, punishment will be inflicted  
 4 which the jury's verdict does not allow, and a defendant's right under  
 5 the 6th Amendment violated (Blakely, Ibid., at 2537, 414), as is occurring  
 6 in this case.

7           III. CALIFORNIA'S IMPLEMENTATION OF THE "MINIMALLY  
 8 NECESSARY" STANDARD DEPRIVES APPEARING  
 9 PRISONERS OF THEIR FEDERALLY PROTECTED  
     LIBERTY INTEREST BY EVISCERATING THE "SOME  
     EVIDENCE" STANDARD.

10 California's parole scheme give rise to a cognizable liberty interest  
 11 in release on parole (Biggs v.Terhune (9th Cir.2003) 334 F.3d 910, 914-  
 12 915), therefore, "In the parole context, the requirements of due process  
 13 are met if 'some evidence' which has an indicia of reliability supports  
 14 the decision." (Ibid.) As the federal district court judge reasoned, Biggs  
 15 was serving a sentence of twenty-five to life following a sentence for  
 16 a 1985 first-degree murder conviction. He challenged the 1999 Board decision  
 17 finding him unsuitable for parole despite his record as a model prisoner.  
 18 (Id., at 913.) The court upheld the use of his commitment offense in that  
 19 case as it involves the murder of a witness, finding that the murder was  
 20 perpetrated by beating the victim to death using multiple blows from a  
 21 baseball bat, was carried out in a manner exhibiting a callous disregard  
 22 for life and suffering of another and that petitioner could benefit from  
 23 therapy. (Ibid.) However, the court cautioned that:

24           As in the present instance, the parole board's sole  
 25 supportable reliance on the gravity of the offense  
 26 and conduct prior to imprisonment to justify denial  
 27 of parole can initially be justified as fulfilling  
 28 the requirements set forth by state law. Over time,  
     however, should [a prisoner] continue to demonstrate  
     exemplary behavior and evidence of rehabilitation,  
     denying him a parole date simply because of the nature  
     of his offense would raise serious questions involving

1 his liberty interest. (Id. at 916.)

2 The court also stated that in that case "[a] continued reliance on  
3 an unchanging factor, the circumstances of the offense and conduct prior  
4 to imprisonment, runs contrary to the rehabilitative goals espoused by  
5 the prison system and could result in a due process violation." (Id. at  
6 917.) A standard denoting that the parole board should determine who will  
7 be a danger to the community by looking at the commitment offense in terms  
8 of its predictive value. Therefore the more violent, thoughtless, and callous  
9 the crime, the more likely it can be said that the perpetrator would exhibit  
10 those tendencies again. However, aside from punishment, the parole  
11 executive's role is to determine when these presumptions have been confirmed  
12 or rebutted. The Biggs court appears to agree with In re Rosenkrantz (2002)  
13 Cal.4th 616, 683, stating that in order for the Board to put weight on  
14 the exceptional nature of the crime, it had to be "particularly egregious."  
15 However, in 2005, the State Supreme Court redefined that term as simply  
16 "that the violence of the inmate's crime must be more than the minimum  
17 necessary to convict him for the offense for which he is confined." (In  
18 re Dannenberg, 34 Cal.4th 1061, 1095, 23 Cal.Rptr.3d 417, 440 (2005).)  
19 However, as the dissent in Dannenberg points out, this standard is  
20 completely unreviewable (Id. 34 Cal.4th at 1102, 23 Cal.Rptr.3d 446), as  
21 the minimal elements of a second-degree murder, are simply that a person  
22 is killed with the perpetrator exhibiting the requisite intent. However,  
23 since any additional fact could be viewed as "more than minimally necessary  
24 to convict." As a result, Dannenberg appears to give carte blanche to the  
25 state parole executive to issue a mere characterization of the crime to  
26 support denial of parole, which is occurring in this case. A standard which  
27 unconstitutionally insulates the parole executive from review in habeas  
28 corpus.

As that federal judge continued to note, since federal due process in parole suitability hearings arise from a liberty interest created by state law, state courts may not interpret their law in such an arbitrary manner that the interpretation is an evasion of the federal due process requirements, minimal as they may be. See Peltier v. Wright (9th Cir. 1994) 15 F.3d 860, 862, "[W]e are bound by state's construction [of state law] except when it appears that its interpretation is an obvious subterfuge to evade the consideration of a federal issue." See also Oxborrow v. Eikenberry, 877 F.2d 195, 1399 (9th Cir. 1989) ("[D]eference to the [state] Court is suspended only upon finding that the court's interpretation [of state law] is untenable or amounts to a subterfuge to avoid federal review of a constitutional violation.") If the Dannenberg interpretation is so unreviewable, i.e., any facts underlying any murder can stand as "some evidence" to deny parole, then the federal standard of "some evidence" is eviscerated, and the Dannenberg decision deprives California prisoners due process. Interestingly, the California Appellate Court now seems to realize the arbitrary features of the Dannenberg minimum necessary standard, redefining it to require evidence of cruelty with trivial provocation. See In re Weider, (2006) DJDAR 15795, 15801, making this holding, effective noting cruelty is synonymous with the exceptional callousness, i.e. tortuous intent, not present in this case.

Continuing with this reasoning, the federal courts judge noted, while Biggs does not explicitly state when reliance on an unchanging factor would violate due process, i.e. when such a factor no longer has predictive value, this determination is made on a case by case basis. Therefore, repeated application of the severity of the crime factor will violate due process when the crime for which incarceration was required grows more remote. (See e.g. Martin v. Marshall, (N.D.Cal.2006) 341 F.Supp.2d 1038,

1 1042; Rosenrantz v. Marshall, (C.D.Cal.2006) 444 F.Supp.2d 1063.

2 IV. THE DEGREE OF THREAT TO SOCIETY POSED BY  
 3 PETITIONER WAS FIXED BY THE SENTENCING COURT  
 4 BASED ON THE COMMITMENT OFFENSE AND AN  
 ASSESSMENT OF THE PROPENSITY OF AN OFFENDER.

5 As noted in Penal Code §3041(B), the state parole authority is to  
 6 comply with any "sentencing information" relevant to the setting of a  
 7 parole release date. This includes Judicial Council sentencing information  
 8 attached to California Rules of Court, Rule 4.421, in the form, of their  
 9 Advisory Committee comments, which clearly notes that trial court  
 10 "sentencing decisions must take into account 'the nature and degree of  
 11 the offense and/or the offender, with particular regard to the degree  
 12 of danger both present to society.' [Citations]" The Judicial Council  
 13 then advised that, "For determination of sentences, justice generally  
 14 requires... that there be taken into account the circumstances of the  
 15 offense together with the propensities of the offender." (Pennsylvania  
 16 v. Ashe, (1937) 302 U.S. 51, 55 [58 S.Ct.59], quoted with approval in  
 17 Gregg v. George, (1976) 428 U.S. 135, 189, [96 S.Ct. 2909, 2932].)  
 18 Sentencing rules and information guidelines which clearly denote that  
 19 at sentencing the court determined the degree of threat to society posed  
 20 by Petitioner equated to second-degree murder, not a more serious crime.

21 CONCLUSION

22 "The test is not whether some evidence supports the reasons the  
 23 [Board or Governor] cites for denying parole, but whether some evidence  
 24 indicates a [prisoner's] release unreasonably endangers public safety.  
 25 (Cal.Code Regs., tit. 15, §2402, subd.(a).) (Citations). Some evidence  
 26 of the existence of a particular factor does not necessarily equate to  
 27 some evidence the [prisoner's] release unreasonably endangers public

1 safety." (In re Lee, supra, 49 Cal.Rptr.3d at 936.) In this case the  
2 only potentially meaningful (but unsupported) factors declared by the  
3 Governor to support finding Petitioner's release would pose an  
4 unreasonable risk of danger to society were those relating to the  
5 immutable circumstances of his 17 year old offense. California courts  
6 are now consistently ruling that the predictive value of the nature of  
7 a 10 to 20 year old murder offense is nil when used to determine if the  
8 offenders release would pose an unreasonable threat to public safety,  
9 especially when accompanied by a positive history after imprisonment.  
10 Accordingly, the Governor's reliance on crime factors to deny Petitioner  
11 parole is one unsupported by reliable evidence, rendering it arbitrary,  
12 requiring his decision to deny parole be vacated, and Petitioner's  
13 immediate release ordered.

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